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C. J. Jaussie; Attorneys for Plaintiff and Appellant;
Gary D. Stott; Attorneys for Defendant and Respondent;

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH

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SHIRLEY W. ADAMS

Plaintiff and
Appellant,

vs.

CHARLES W. ADAMS

Defendant and
Respondent.

Case No. 15,673

---ooo0ooo---

REPLY BRIEF OF PLAINTIFF APPELLANT

---ooo0ooo---

Appeal from the Judgment of The
Fourth District Court for Utah County,
Honorable J. Robert Bullock, Judge

---ooo0ooo---

C. J. JAUSSE
MULLINER, MCCULLOUGH & JAUSSE
424 South State Street
Orem, Utah 84057

Attorneys for Plaintiff and
Appellant.

GARY D. STOTT
STOTT, YOUNG & WILSON
350 East Center St.
Provo, Utah 84601

Attorneys for Defendant and
Respondent.

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424 South State Street
Orem, Utah 84057

Attorneys for Plaintiff and
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GARY D. STOTT
STOTT, YOUNG & WILSON
350 East Center St.
Provo, Utah 84601

Attorneys for Defendant and
Respondent.

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REPLY BRIEF OF PLAINTIFF APPELLANT

---0000000---

NATURE OF THE CASE

This is an action brought by the Plaintiff-Appellant pursuant to the continuing jurisdiction of the Court in a domestic matter, based on an Order to Show Cause by the Trial Court as to why the Defendant-Respondent should not be ordered to pay alimony which has accrued and remains unpaid. Defendant-Respondent objected to the Order to Show Cause, requested that the Trial Court terminate the Defendant-Respondent's alimony obligation and find that Plaintiff-Appellant was estopped from claiming any past due alimony.

DISPOSITION IN THE LOWER COURT

The District Court, in a memorandum decision held that Plaintiff-Appellant was estopped from claiming alimony against the Defendant-respondent except as to any arrearages which had accumulated up to

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March 1972 and for six months thereafter and that the decree was to be modified to reduce alimony to the sum of \$1.00 per year.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant prays that the judgment of the Trial Court be reversed and that this Court direct the Trial Court to enter its order awarding the back due alimony together with interest thereon, to restore the alimony obligation to its former level and to award Plaintiff-Appellant reasonable attorney's fees.

STATEMENT OF FACTS

Plaintiff-Appellant's statement of facts and Defendant-Respondent's statement of facts are not in disagreement except as to the following point. The Defendant-Respondent admitted under cross examination that it was not Plaintiff-Appellant that was constantly pursuing him if he became delinquent on the support obligations but that the State of Utah, acting to recover welfare paid to the Plaintiff-Appellant took the collection actions against Defendant-Respondent. (T., H.)

ARGUMENT

POINT ONE

THERE IS NO LEGAL OR MORAL DUTY TO SPEAK WHERE THE RIGHTS OF THE PARTIES ARE DEFINITELY SETTLED BY A DIVORCE DECREE.

Defendant-Respondent assumes at the outset of his brief, that the Plaintiff-Appellant has a legal or moral duty to speak regarding past due and unpaid alimony. This assumption is unfounded and contrary to the logic this court has consistently applied to the doctrine of estoppel as it is employed in matters of unpaid child

support and alimony. In French v. Johnson, 16 Utah 2d 360, 401 p2d 315 (1965) This court clearly explained why there is no legal or moral duty to speak regarding past due alimony or child support. It is because the divorce decree does justice between the parties, defines each of the rights and obligations each party must assume and is modifiable by either party at any time should circumstances require such a modification. In this court's footnote #2 to French v. Johnson id, at p315, the Court said:

"The . . . child support decree did justice between the parties. The extent of the duty of the appellee to support his minor children was definitively settled by the Decree until altered or amended. There is no possibility of the Decree being obscured by the passage of time....."

The Decree definitively settles the right and duties of the parties leaving no additional moral or legal duty for the parties to speak.

Plaintiff-Appellant is constrained to point out to the court some points of Defendant-Respondent's brief which seem to be particularly misleading. At page 6 of Defendant-Respondent's brief, a quote from Larsen v. Larsen 5 Utah 2d 224, 300 p2d 596 (1956) contains a parenthetical which is not in the original text of the Court's decision and which gives the false impression that this Court reached a conclusion that mere silence would work an estoppel. This Court did not reach such a conclusion in Larsen v. Larsen id, nor has there been any other case to Plaintiff-Appellant's knowledge dealing with family support in which this court has reached such a conclusion. This Court's holding in French v. Johnson supra is still valid and controlling of the issues on the present case. The decision of the trial court in estopping Plaintiff-Appellant from collecting past due alimony should be reversed.

POINT TWO

PAST DUE ALIMONY IS A VESTED RIGHT WHICH MAY NOT BE DIVESTED UNLESS THE PARTY WHO CLAIMS THE RIGHT HAS ACTED IN SUCH A MANNER AS TO CLEARLY PREJUDICE THE RIGHTS OF THE PARTY AGAINST WHOM THE RIGHT HAS SOUGHT TO BE ENFORCED.

Throughout the text of Defendant-Respondent's brief, a thread of argument is put forward that "the Appellant has supported herself and has not found it necessary to rely on the Respondent for five years," (Defendant-Respondent's brief, pg. 7) and that "prior to the Decree, the Appellant hounded the Respondent continuously for support payments, and then for five years was silent." (Defendant-Respondent's brief, pg. 9) Such is clearly not the case. Defendant-Respondent disclosed under cross-examination that it was not Plaintiff-Appellant who "Harrassed him continuously" for child support, rather was the State of Utah acting to recover welfare paid to Plaintiff-Appellant that sought reimbursement from Defendant-Respondent. (Tr. 14, 15,) Defendant Respondent has used these innuendos and suppositions to support the theory that this case may fall under the principals of Wallis v. Wallis 9 Utah 2d 237, 342 P2d 103 (1959) and Petersen v. Petersen 530 p2d 821 (Utah 1974). Plaintiff-Appellant contends that the record simply will not support such a claim.

In Wallis v. Wallis id the husband was unable to pay the amount agreed as alimony and had made a supplementary agreement to pay a lesser amount. When he was unable to pay the lesser amount, the

sued to collect the original larger amount of delinquent alimony. In spite of the financial hardship imposed on the husband, this court upheld the right of the wife to collect the full amount of unpaid alimony. Even Justice Crocketts concurring opinion dealt only with the manner in which the execution on the judgment should proceed. In Petersen v. Petersen supra, the wife had been held in contempt for failure to allow the husband visiting privileges with the children. One of the provisions of the contempt citation was a suspension of the husband's duty to pay child support until the wife purged the contempt. Nine and one half years later, the wife asked for payment of the arrearages without purging herself of the contempt. This Court ruled that the contempt citation was still valid and that the child support was still suspended.

Neither of these cases are applicable to the present case. Defendant-Respondent was financially able to procure legal counsel each time the Divorce Decree was modified. Certainly Defendant-Respondent was under no hardship which would make it impossible to pay the alimony. He was earning over \$900.00 per month at his employment in 1972 and \$1200 per month in 1978 and was continuously employed during that time. (T., 22) He had, during that same period of time, purchased at least three pieces of property. (T.,22) Plaintiff Appellant was not in contempt of court, and is not in contempt of Court and no order was ever signed suspending Defendant-Respondent's duty to pay alimony as a result of any contempt.

Defendant-Respondent cites Austed v. Austed 2 Utah 2d, 269 P2d 284 (1954) for additional authority that there may be some circumstance

where a party may be estopped from claiming past due alimony, such as where the wife remarries, or where the wife abandons the care of the children to the care of the husband. Plaintiff-Appellant does not disagree with this proposition, but such facts are not present in this case. In Openshaw v. Openshaw, 105 Utah 574, 144 P2d 528, 530 (1943) this court said:

"In Openshaw v. Openshaw, last cited, we held that the right of the trial court to modify an alimony or support money award does not extend to installments which have already accrued and which are past due, because the right to collect such installments becomes vested upon the due date....When the right to collect money under the terms of the decree has vested, it is not within the province of the court to divest such right, unless the party who claims the right has acted in such a manner as to clearly prejudice the substantial rights of the party against whom the right is sought to be enforced." (emphasis added)

Plaintiff-Appellant has not remarried, has not misrepresented her claims to Defendant-Respondent, either explicitly or implicitly, and has not acted in any way to "clearly prejudice" the Defendant-Respondent's substantial rights. Plaintiff-Appellant was not even present when Defendant-Respondant last obtained the modification of the Divorce Decree in which he failed to seek a reduction of alimony. The elements which would allow the Court below to invoke an equitable estoppel are simply not present in this case.


CONCLUSION

Plaintiff- Appellant respectfully submits that there is no legal or moral duty for Plaintiff-Appellant to speak regarding her right to unpaid and vested alimony. The Divorce Decree definitively settled the duties of the parties.

There is no evidence of an ulterior motive on Plaintiff-Appellant's part which would justify the court intervening on the Defendant-Respondent's behalf. Though both parties may have been equally unaware of their rights, Plaintiff-Appellant has not represented or misrepresented herself in any way which would justify making her bear the burden of Defendant-Respondent's mistake.

The decision of Court below is patently erroneous and Plaintiff-Appellant is entitled to Attorney's fees both on appeal and at the Court below and to an Order reversing the decision of the Court below.

Respectfully submitted this 11TH day of September, 1978.



C. J. Jaussi
of the firm of
Mulliner, McCullough & Jaussi
424 South State Street
Orem, Utah 84057

Attorneys for Plaintiff-Appellant

I hereby certify that I served the foregoing Reply Brief of Plaintiff-Appellant by delivering two copies thereof, to the office of Gary D. Stott, Attorney for Defendant-Respondent, 350 East Center, Provo, Utah 84601 this ____ day of _____, 1978.

C. J. Jaussi